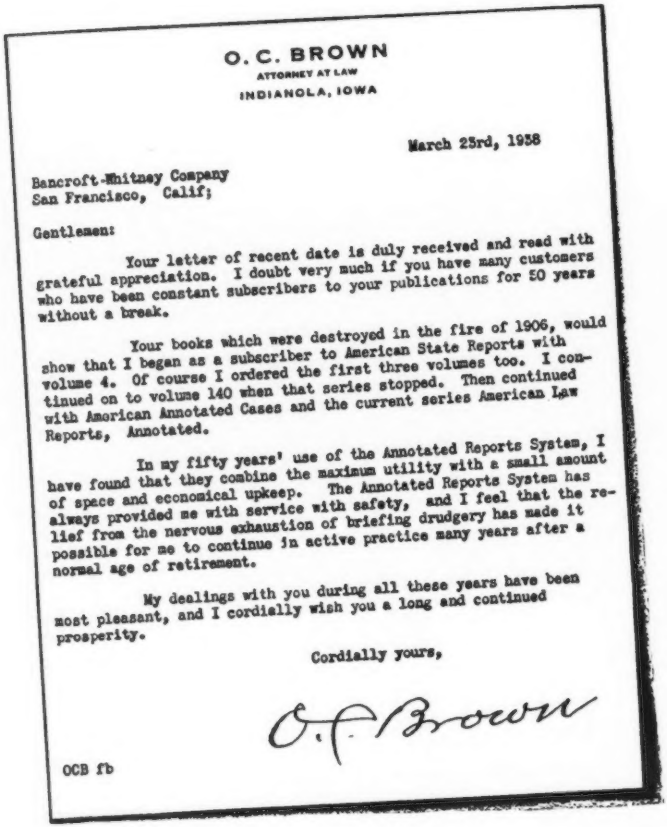
CASE AND COMMENT

"No richer gift has autumn poured,
From out her lavish horn."
—Whittier

VOL. 44 OCTOBER ★ 1938 NO. 2

What a Tribute TO A PUBLISHER AND ITS PUBLICATIONS



O. C. BROWN
ATTORNEY AT LAW
INDIANOLA, IOWA

March 23rd, 1938

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San Francisco, Calif;

Gentlemen:

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Cordially yours,

O. C. Brown

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Case and Comment

THE LAWYERS MAGAZINE

Vol. 44 **CONTENTS** No. 2

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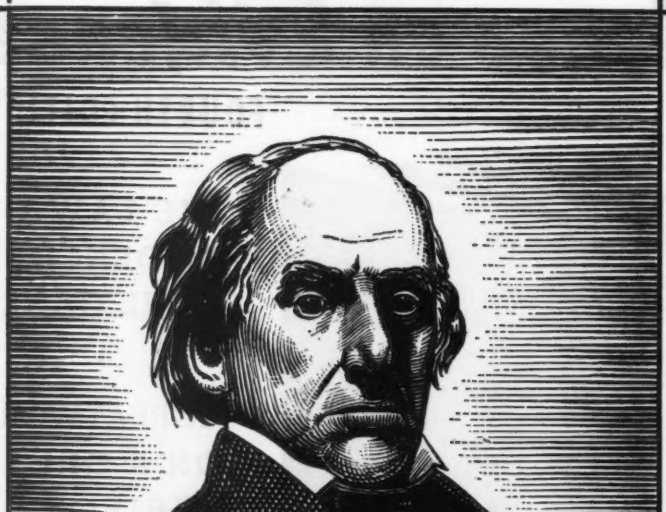


DANIEL WEBSTER

DANIEL WEBSTER: THE OLYMPIAN

By ROY ST. GEORGE STUBBS
Member of the Winnipeg, Canada Bar

(Condensed from American Bar Association Journal, October 1937)

Now and then there is born into the world a man who seems too large for daily life. Built on Olympian scale, he towers above the crowd as an Alpine peak towers above the plains beneath. He is meant for critical times and large issues. He cannot be great on all occasions. As Johnson said of Milton, it might be said of him, that while he could carve a giant out of a rock, he would not condescend to carve heads out of cherry stones. Such a man was the godlike Daniel Webster, the Defender of the Union and the Constitution, and the voice of the awakening consciousness of the American people.

Too frail and delicate to help with the heavy tasks of pioneer farming, he was left very much to himself during the first years of his life. Thrown thus upon his own resources, he developed a fondness for hunting and fishing and a passion for reading. In the long evenings of winter, his mother and sisters had taught him to read before he left his childhood behind. An apt pupil, in whom ability and willingness to learn were united, it was not long before he could read better than anyone in the countryside. Books were scarce, and every book that fell into his hands, he devoured as if it were the last he would ever see. He had a memory which held on to everything he read. As a boy, he once bought a pocket handkerchief on which was printed the Constitution of the United States, then in the pride of infancy, and forthwith committed it to memory—perhaps dreaming of the part he would play in defending that Constitution, for every boy's head is a humming hive of dreams.

Law attracted the best minds of the day. What was more natural than that it should attract Daniel Webster! When he made known his intention of going to the Bar, he was advised by well-meaning friends that the profession of the law was overcrowded. His reply was, "There is room enough at the top." In that spirit, after taking his degree from Dartmouth, he entered the law office of Thomas W. Thompson (later a Senator), of Salisbury, as a student. A few months later, his family feeling a financial pinch, he broke his law course to teach school so as to help his father carry the burden of his elder brother Ezekiel's education. In some respects, Ezekiel Webster was the equal of his more renowned brother, but he lacked Daniel's easy assurance and complete self-confidence. It used to be a saying of their father's that "Ezekiel could not tell half he knew; but Daniel could tell more than he knew."

Great men have to meet and conquer or go down before the same problems as ordinary men. They have to come to decisions on which their whole future may turn. In July, 1804, Webster entered the law office of Christopher Gore, in Boston, to put the final touches to his legal education. A few months before he finished his course, he was offered a position as clerk of the court of common pleas. His father was overjoyed, but Mr. Gore strongly advised him not to accept the position. "I have a notion that your mission is to make opinions for other men to record, and not to be the clerk to record the opinions of courts. You are destined for higher distinctions than to be

clerk of a court, if I am not mistaken," he said to Webster. After much thought Webster finally refused the position which would have meant financial security for his whole family. The final result of his life lies before us to be measured. We can now see that he came to a wise decision, but would we have thought so when he let $2,000 a year slip through his fingers to embark upon the uncertain sea of advocacy? Would we have sided with his father or with Mr. Gore?

In March, 1805, Daniel Webster was called to the Bar and began the practice of law at Boscawen. In his first appearance before the Supreme Court of New Hampshire, he showed such skill that the presiding judge, the famous Jeremiah Smith, said that he had never before met such a young man. Opportunity knocked at the door for men of talent in those days. Webster did not let opportunity pass him by. He labored conscientiously in his profession, ever on the lookout for a chance to better his position. In 1807, in search of wider fields, he turned over his business in Boscawen to his brother Ezekiel and moved to Portsmouth.

The leader of the New Hampshire Bar was then Jeremiah Mason, the Scarlett of America, one of the greatest common lawyers that ever lived. Webster fully appreciated Mason's greatness. He once said to Choate, "If a man had Jeremiah Mason, and he did not get his case, no human ingenuity or learning could get it." Webster and Mason often opposed each other. On their first encounter, Mason said: "He broke upon me like a thunder shower in July, sudden portentous, sweeping all before it. It was the first case in which he appeared at our bar; a criminal prosecution in which I had managed a very pretty defence, as against the Attorney-General, Atkinson, who was able enough in his way, but whom I knew very well how to take. Atkinson being absent, Webster conducted the case for him, and turned, in the most masterly manner, the line of my defences, carrying with him all but one of the jurors, so that I barely saved my client by my best exertions."

By striving with greatness we become great. Webster once remarked that he owed his success in his profession to the close attention he had to pay to Jeremiah Mason for nine years. Mason made him keep his blade polished. As Choate said, "Mason paid him the unequivocal compliment, and did him the real kindness, of compelling him to the utmost exertion of his diligence and capacity by calling out against him all his own."

There were no frills about Mason. As an advocate he was homely and direct. He would stand so close to the jury that he could have touched their noses and talk to them in the voice of ordinary conversation until his persuasive reasoning convinced them of the justice of his cause. Webster's style was rather heavy and florid, when he first encountered Mason. When Mason stole victories from him, he soon came to realize that the purpose of advocacy is to storm the gates of conviction, in the most direct manner, and not to weave garlands of rhetoric which while they charm do not convince. Webster once said that clearness, force and earnestness are the qualities which produce conviction. These qualities his own style possessed after it had been purified of its early tendencies.

Webster's method of dealing with witnesses was characterized by great directness. He once had a bank cashier in the box who had testified that the signature to a will was not genuine. "You say you think this is not Mr. Tuft's signature. What

means had you of knowing Mr. Tuft's signature?" he asked him.

"I was cashier of the bank of which he was president, and used to see his signature in all forms, and very often to obligations and notes and bills," replied the witness.

"And you think that is not his signature? Please to point out, if you will, where there is a discrepancy."

"I do not know as I can tell."

"But a sensible man can tell why he thinks one thing is not like another."

"Well, in the n the top used to be closed."

"Gentlemen of the jury, you hear: the top was closed. Go on."

"The s at the end of his name was usually kept above the horizontal lines; this is below."

"Well; any other?"

"Not any other."

Webster then took a number of signatures admitted to be genuine and showed that they had the open n and the s below the horizontal line. His few simple questions had thus destroyed the effect of the witness's testimony.

In the same trial, there was a witness who swore that Webster's client had had a hundred conversations with him, admitting in each conversation that he had no case.

Questioned a second time as to how many conversations he had had, the witness replied, "Well, it might not have been more than sixty or seventy times."

The third time he was questioned he came down to fifty times.

Webster did not cross-examine him, but when he addressed the jury, he dealt with his testimony thus: "Now I come to the testimony of Mr. Skilton; and I can't better illustrate it than by telling a snake story that I once heard told by a man who was in the habit of drawing a pretty long bow. If he went out hunting or shooting, he always heard or saw something very wonderful. On one occasion he reported that he had seen a hundred black snakes, all in a row, and all twenty feet long. 'Why,' said a bystander, 'I don't believe you ever saw one hundred black snakes in the world.' 'Well,' replied he, 'there were seventy-five.' 'I don't believe there were seventy-five.' 'Well, there were fifty, at any rate.' 'I don't believe there were fifty.' 'Well, there were forty.' And he finally got down to two, when he planted his foot firmly on the ground, and said: 'I declare to you that I won't take off another snake; I'll give up the story first!' So this witness began at a hundred, and got down to seventy-five and fifty; but all my learned brother's efforts could not get him below fifty; he 'had rather give up the story!' "

Both at the Bar and in politics, Webster often told a happy anecdote to illustrate the point he was making, —much in the homely manner of Lincoln. He was once criticized for a speech he had made, and when asked if he were going to hit back at his critics, he replied, with a smile: "I knew an old deacon down in Connecticut,—a pious, good old man,— who shared the fate of many other good men in being slandered without cause. He took no notice of the accusations made against him, but as they were uncontradicted they spread; and, by being repeated from mouth to mouth, of course they lost nothing, and finally came to the minister's ears. The rumors began to be spoken in an audible voice. At last his pastor went to him, and said: 'They are saying so and so about you. I don't suppose it's true, but why don't you say something to deny it?' The old deacon replied: 'I always make it a rule never to clean out the path until the snow has done

falling.' I am of the deacon's way of thinking: and I don't think I shall clean out the path till it has done snowing."

Webster soon reached such a point in his profession that Portsmouth was no longer large enough to hold him. In June, 1816, he moved to Boston where he encountered the best advocates of the day and proved himself their equal.

Daniel Webster's greatest victory before a jury was in the first case affecting life in which he was concerned for the prosecution. He was pleading not to preserve life but to destroy it. His eloquence was enlisted not to save some poor wretch from the gallows but to make him pay the extreme penalty for transgressing the laws of man. Yet laboring under the restrictions rightfully placed upon a prosecution, Webster produced his forensic masterpiece.

In the stillness of night, on 6th April, 1830, as he slept peacefully beneath his own roof, life was emptied from the aged body of Captain Joseph White by one thrust of a dagger. A man without an enemy in all the world, Captain White was enjoying the twilight years of his life in modest retirement at Salem. His violent end came as a shock to the people of the community in which he lived and they diligently set themselves the purpose of finding and punishing his murderer. When all tangible clues had been run to earth, suspicion seemed to point to four men—Richard Crowninshield, George Crowninshield, John Francis Knapp and Joseph J. Knapp—and they were accordingly arrested on charges of murder, aiding and abetting in a murder, and conspiracy to murder.

Webster was called in as special counsel to lead for the prosecution in the case against John Francis Knapp. He opened his speech with the sure, swift touch of genius. "Gentlemen, it is a most extraordinary crime," he said, hastening to make himself clear on the question of motive. "In some respects it has hardly a precedent anywhere; certainly none in our New England history. This bloody drama exhibited no suddenly excited, ungovernable rage. The actors in it were not surprised by any lion-like temptation springing upon their virtue and overcoming it, before resistance could begin, nor did they do the deed to glut savage vengeance, or satiate long-settled and deadly hate. It was a cool, calculating, money-making murder. It was all 'hire and salary, not revenge.' It was the weighing of money against life; the counting out of so many pieces of silver against so many ounces of blood." He was later to bring home this money motive to the prisoner by showing that he had an interest in the murdered man's estate.

Nowhere, perhaps, outside of the pages of Shakespeare, is murder and its corrosive effect upon the murderer better described than in Webster's speech. Had he seen the uplifted dagger guided by the hand of the assassin to its fatal mark, he could not have given a more vivid description of the crime.

He pictured the murderer struggling with his secret—a secret too large for him to lock up in his own breast. "Such a secret can be safe nowhere," Webster said. "The whole creation of God has neither nook nor corner where the guilty can bestow it and say it is safe. The human heart was not made for the residence of such an inhabitant. It finds itself preyed upon by a torment which it dares not acknowledge to God or man. The secret which the murderer possesses soon comes to possess him. He feels it beating at his heart, rising to his throat and demanding disclosure. He thinks the whole world sees it in his face, reads it in his

eyes, and almost hears it workings in the very silence of his thoughts. It has become his master. It betrays his discretion, it breaks down his courage, it conquers his prudence. It must be confessed! It will be confessed! There is no refuge from confession but in suicide and suicide is confession."

His reference to suicide is to the fact that Richard Crowninshield, whose hand, it was thought, held the dagger by which Captain White was killed, committed suicide after his arrest.

By necessity the evidence against John Francis Knapp was purely circumstantial for midnight assassins invite no witnesses to go along with them. It was Webster's task to dovetail the isolated facts into each other in such a way that they admitted of no doubt of Knapp's active participation in the crime. Before he reached his dramatic climax in which he exhorted the jury to so find a verdict that they could remain on good terms with their consciences, no one doubted that he had not succeeded in his task. His peroration put the jury completely under his spell. "With consciences satisfied with the discharge of duty, no consequences can harm you," he began, speaking in a grave, earnest voice. "There is no evil that we cannot either face or fly from, but the consciousness of duty disregarded. A sense of duty pursues us ever. It is omnipresent like the Deity. If we take to ourselves the wings of the morning to dwell in the uttermost parts of the sea, duty performed, or duty violated is still with us, for our happiness or our misery. If we say that darkness shall cover us, in the darkness as in the light our obligations are yet with us. We cannot escape their power, nor fly from their presence. They are with us in this life, will be with us at its close; and in that scene of inconceivable solemnity which lies yet farther onward, we shall find ourselves surrounded by the consciousness of duty, to pain us wherever it has been violated, and to console us so far as God has given us grace to perform it. . . ." When his voice died away, there was no will but his, and the jury recorded his will by their verdict of guilty. John Francis Knapp was hanged, as was also Joseph J. Knapp. Richard Crowninshield died by his own hand and George Crowninshield proved an alibi and was discharged. Thus ended the greatest criminal case in which Webster had a part.

As Byron K. and William F. Elliot point out in their scholarly volume, The Work of the Advocate: "The first step cannot be safely taken in a case without a settled and certain theory. A case must be put to trial upon a definite theory; that theory the pleadings must outline, the evidence sustain, and the law support." Daniel Webster never went into court without a settled and certain theory of his case. In his defence of the Kennisons, toll-gate keepers at Newburyport, for the robbery of a drover named Goodrich, the value of this policy was clearly illustrated. Goodrich staged a make-believe robbery of himself and to make it appear genuine shot himself in the hand, his purpose being to avoid payment of his debts. To make his plan even more certain of success, he hid some gold in the cellar of the Kennisons, and had them arrested for robbery. The Kennisons bore a good name in their community and their friends briefed Webster to defend them. When he had gone into the case, Webster came to the conclusion that from the position of his wound on the inside ends of the fingers of his left hand, Goodrich must have shot himself.

Discussing the trial with his friend

Peter Harvey after the acquittal of the Kennisons, Webster said: "The evidence was strongly circumstantial, for Goodrich would not swear that Kennison was the man who assaulted and robbed him; but he said it was a man who looked like him. Taking all the circumstances together,—the evidence was pretty strong against the accused. I had in my mind all the while what Perkins (the man who first suggested to him his theory of the case) had said to me about shooting the inside of the hand; and after the Government had examined Goodrich for three hours, and made him tell a pretty straight story, they said they were through, and gave him to me to cross-examine. Then, for the first time in the history of the case, the line of the defence developed itself in the first question which was asked. I never saw a man's color come and go so quickly, as when I asked him to explain how it was that he was wounded on the inside of his hand. He faltered, and showed the most unmistakable signs of guilt. I made him appear about as mean as any man ever did on the witness stand. The Kennisons were triumphantly acquitted, and Goodrich fled. Everyone saw at once that he had perpetrated this robbery himself."

Webster was able to succeed in the law, while devoting the major portion of his time to politics, because of his rapid assimilation of facts and his retentive memory. Like Sir Charles Russell, he could read his briefs with someone else's eyes. Once he was briefed in a case with St. George Tucker. At the time he was very busy in the Senate, so that the preliminaries of the case fell upon his associate. Webster, however, promised faithfully to make the closing argument and the night before he was to redeem his promise he had an interview with St. George Tucker, who had a pile of papers a foot thick in front of him, and was prepared to go into the case as fully as time would permit, but Webster said, "We haven't time for all this. Give me the case generally and the salient points." For two hours his associate drilled him in the facts of the case. As the interview closed, Tucker pointed out that the other side wanted to delay the case, and would be sure to ask for a continuance. They had availed themselves of every opportunity for delay, he said, having spent six days in the cross-examination of one witness alone.

Next day Webster opened his case with all his usual confidence. Listening to him one would have been convinced that he was thoroughly familiar with every aspect of the case. His speech, however, was nothing more than what his associate had posted him on, but Tucker's unadorned statements of fact were paid the interest of genius in passing through Webster's mind. One sentence will illustrate what Webster's genius did with a simple statement. In opposing a continuance, he said, "They ask for a continuance! Why, may it please the court, they have taken at this hearing as much time in the cross-examination as it took the Almighty to create the Universe. . . ."

Webster was once asked by Peter Harvey what he considered his greatest speech. He replied, "My forensic efforts have been those which have pleased me most. The two arguments that have given me the most satisfaction were the argument in the 'Steamboat Case,' and the Dartmouth College argument."

The Dartmouth College Case was Webster's greatest success before the Supreme Court. It was a decisive battle of the law, having decided, once and for all, that a grant of corporate powers is a contract, the obligation of which the States have no right to invade.

In 1769, a charter was granted to Dartmouth College, on the assurance that when the charter was granted property would be given to the College. The affairs of the College were to be managed by a body "corporate and politick" known as the Trustees of Dartmouth College. All went well with Dartmouth until after the death of its first president, when a quarrel arose as to the appointment of his successor. This quarrel was not confined within the four walls of the College but spread into the political arena. In 1816, the Legislature of New Hampshire passed a succession of acts amending the charter. These acts did not have the approval of the trustees. Defeated on the political front, they carried the battle into the courts. Judgment went against them in the State Courts and they appealed to the Supreme Court. Daniel Webster and Joseph Hopkinson appeared for the trustees, with William Wirt and John Holmes as their opponents. On the bench were Chief Justice Marshall and Justices Washington, Livingston, Johnson, Story, Todd and Duvall.

The Dartmouth Case came to Webster in his thirty-seventh year. Since his removal to Boston, a few months previous, he had been waiting for just such a case. As ambitious as Cæsar, he had longed for a case which he felt adequate to his talents.

Jeremiah Mason had carried the burden of the argument for the trustees in the State Courts and Webster had the advantage of his forensic genius to guide him when he appeared before the Supreme Court. Webster spoke for four hours, always as an advocate, sometimes as a man, going beyond the bounds of strict legal argument and venturing into the provinces of passion and emotion. His peroration was said to have charmed and melted his audience. And what wonder! "Sir, you may destroy this little institution," he said, addressing himself to Chief Justice Marshall, who was brought to tears by his pathetic appeal. "It is weak; it is in your hands! I know it is one of the lesser lights in the literary horizon of our country. You may put it out. But if you do so, you must carry through your work. You must extinguish, one after another, all those great lights of science which, for more than a century, have thrown their radiance over our land! It is, Sir, as I have said, a small college. And yet there are those who love it. . . . Sir, I know not how others may feel, but, for myself, when I see my alma mater surrounded like Cæsar in the Senate House, by those who are reiterating stab upon stab, I would not, for this right hand, have her turn to me and say, 'et tu quoque mi fili!' 'and thou too, my son!' "

The "Steamboat Case," Gibbons v. Ogden, concerned the constitutionality of the right of the State of New York to give to Robert Fulton, and his heirs forever, a monopoly to run steamboats on the State waters. Ogden derived from Fulton the right to run steamboats between New Jersey and New York City. Gibbons put steamboats on the same route and, before the Supreme Court, Webster maintained his right to do so on the ground that Congress had the exclusive authority to make regulations affecting commerce on navigable rivers. When Webster began his argument, Chief Justice Marshall threw down his pen with a gesture, as much as to say there is nothing in this, but Webster went on with his argument undismayed, marshalling point after point in solid phalanx, and finally Chief Justice Marshall began nodding his head in approval of all he said. When judgment was delivered it was little more than a recital of Webster's argument.

As a lawyer, Webster's name is usually associated with cases such as the Dartmouth and Gibbons v. Ogden cases on which some pillar of the Constitution rests. As a general purpose lawyer, a lawyer who could turn his hand with equal grace to any of the lawyer's multifarious tasks, he fell behind many others. But in the words of Hon. William M. Evarts: "I am quite sure that there is not, in the general judgment of the profession, nor in the conforming opinion of his countrymen, any lawyer that, in the magnitude of his causes, in the greatness of their public character, in the immensity of their influence upon the fortunes of the country, or in the authority which his manner of forensic eloquence produced in courts and over courts, can be placed in rank with Mr. Webster."

THEY GET WHAT THEY PAY FOR

LAWYERS are not infrequently heard to complain of the type of client who likes to "shop around" when in need of legal services and seek out the attorney who will quote the lowest price.

This kind of client thinks of legal services as he would of a piece of furniture or an automobile—in terms of prices and beating the market. He is the confirmed bargain hunter. If there were such a thing as a distress sale of that which lawyers have to offer, you would observe this client in the front row of bidders.

Where he knows something about what he is buying this man may often be rewarded for his search. He has a good chance of getting his automobile or furniture at a bargain price. But he will never find a bargain in legal work, for the simple reason that he can not appraise the value of the lawyer's product.

Somebody ought to tell this man—in fact, some of the Bar's programs to educate the public might well be directed at him—that there are many ways of doing the same piece of legal work. It may be very well done or very badly done. In either case it is "done," in the sense that the fee is earned. But in one instance where the cost was $100 the matter is forever disposed of; in the other, where the cost was only $10, the results of inferior work will arise to plague the client when his bargain furniture is in the way of becoming an antique and his automobile has run the gamut of used car lots and finally disappeared.

If a lawyer is aproached on a price basis and the client puts a low estimate both on the importance of his case and the value of the lawyer's work, what human being will or can put his very best thought and effort into the task at hand?

The bargain hunting client gets what he pays for—or perhaps a little less.

—CLEVELAND CIRCUIT COURT INDEX.

STATE OF WISCONSIN — CIVIL COURT
MILWAUKEE COUNTY

THOMAS C. CARVER,
Plaintiff,

v.

SYMPHONIC MALE CHORUS OF MILWAUKEE, a Wisconsin corporation, and ALFRED HILES BERGEN,
Defendants.

BEFORE THE HONORABLE CARL RUNGE, JUDGE

ARGUMENT BY WM. B. RUBIN ON BEHALF OF DEFENDANT BERGEN

Carver sued for $85.00 claiming that at the request of defendant Bergen he had arranged for chorus the music of "The Day is Dark and Dreary," author, Longfellow, composer, defendant Alfred Bergen.

The defense was that the arrangement was on a contingent basis; that the arrangement was poor, incomplete and defective. When the case was tried in court a piano was brought in by the defendant Bergen and by a quartet accompaniment the music was heard in court, two of the quartet and the pianist being lawyers. The errors in the arrangement were demonstrated.

THE most recent popular tune is "Whistle While You Work." This case should be remembered as "Sing While You Litigate."

This is a case that deals not with the sordid, base chores of life. It concerns itself with the heavenly art of music. It takes us from mundane and prosaic occupations on wings of ecstacy where the daily routine of life is forgotten and abandoned and we are transported through the ethereal gates into the palace of the muses where classic music is the staff of the soul.

Shakespeare said: "If music be the food of love—play on." Love lives on sweets, on harmony, and concord. Discord and dissonance are the enemies of love, and the banalities of music.

Imagine the jar upon the judicial ear to have some one rise in Court and urge that the burden of proof be upon him who defends and not upon him who asserts, or that the preponderance of evidence is not necessary to sustain a civil action, but any guess is sufficient, and you have a parallel solecism when the musical ear of a connoisseur is jarred by the playing of a "B-flat" when it should be a "C-natural," or the piping of a shrill note on a piccolo, when music deftly fingered on the strings of a harp should interpolate.

This case is unique. It calls for innate talent and experience based upon study.

The sawing of a cord of wood, the trite legalistic example used by counsel for plaintiff has no place in this case. We are dealing with art—music. In the first place, the ripping of a saw through a knotted piece of wood, creates a nerve-racking discord and dissonance that would jar even the ear of a Republican elephant. In the second place, the only music from a saw, if it be music, is "hillbilly" music. Lo and behold! Let us not digress, for we are dealing with classical music, the glory and glamour of the great artists of the world.

When Sam saws a cord of wood and Jim stands by and Jim uses the cord of wood (there is no art in sawing wood for fuel), Sam is, of course, entitled to be paid, for labor is worthy of its hire, and you do not even need democracy to prove it. But if Sam cuts a cord of wood because Jim suggests there is "a chance to make money by it," and it isn't Jim's cord of wood and Jim doesn't use it, Jim is not liable. (I apologize for syncopating some of this speech when dealing with so classical a subject, but how can it be helped when we are forced to dilate upon wood and saws.) The men who used the wood, received the benefit, should be held liable on a *quantum meruit*.

Let us return this case to its high, gentle and refined stratum of soulful fastidiousness.

Longfellow, America's greatest poet, wrote the poem "The Day is Dark and Dreary." That poem is a classic. Bergen, of Milwaukee birth and national renown in the musical world, composed the classical music for that mournful philosophic poem. Imagine a schoolboy, with the string of his top sticking out of one pants' pocket and marbles falling out of the other, on Commencement Day reciting Longfellow's poem, "The Day is Dark and Dreary" in a listless, bashful, dismembered manner. I can see the teacher, behind her forced smile, gnashing her teeth, and his mother hanging her head in shame, and afterward I can see the boy paddled over the chassis of his pantaloons, as he should be, for his desecrated manner of recitation.

Now take this wonderful Longfellow poem that was set to music, heavenly, soulful and inspiring, and have someone arrange it so that it sounds like a tenor singing, "My Country 'Tis of Thee," and the bass at the same time singing, "Yes, We Have No Bananas." That is what has happened here. The plaintiff undertook to arrange the music for a chorus of seventy stalwart Milwaukeeans, ranging all the way from high tenor to second bass. Imagine the exultant expectancy on their part to sing that poem set to the liquid music of Bergen played by an orchestra, and then find, because of its faulty arrangement, that the orchestra had to be abandoned and the song sung only with the aid of the piano, to the disappointment of the Racine elite, who had paid their price of admission to hear "The Day is Dark and Dreary" to be sung to the accompaniment of its own orchestra of local pride, and were obliged to hear it only to the fingering of a piano.

It is fortunate for the plaintiff that Bergen has good conservative Milwaukee blood in him, for if Bergen were a Latin and plaintiff's arrangement of his classic had been perpetrated upon him, I know countries where, if he had killed the plaintiff, it would have been designated as "justifiable homicide" and the dead buried outside of the gate of consecrated ground for his *scandalum magnatum*.

The original complaint sued both defendants, to-wit: The Symphonic Male Chorus of Milwaukee, and the defendant Bergen, on the theory that both the agent and principal could be sued for a breach of contract. Upon demurrer, the complaint was abandoned and an amended complaint was served in which the plaintiff expressed doubt as to who was liable, and now there is no doubt that the plaintiff alone is liable for the catastrophe that befell the Racine patrons of classical music. It was established in Court that defendant, Symphonic Male Chorus of Milwaukee (there is no doubt about their being male, and let us hope symphonic) had neither authorized nor contracted for the arrangement, and of course the case

against the corporation was properly non-suited. Now they seek to hold Bergen for the exorbitant debt for an arrangement incomplete, sour and irritant. Verily a musical cancer.

Let us analyze the situation. In the first place, the plaintiff knew that the arrangement was not for Bergen, but for the Symphonic Male Chorus. That it was not for his own use and benefit, and that Bergen was not to pay for it. Hence, he did not render services to or for the use and benefit of Bergen. It was plaintiff's duty to ascertain in advance whether the corporation would accept the labor and pay therefor. It was up to him to ascertain the agency, if any. In the second place, nothing was said of payment. As good musicians they never spoke of payment. With rare exceptions, sad to relate, musicians are not business men. In other words, they are so absorbed in their music that they are without intent, nor with ability to concern themselves with the filthy lucre that makes the world go on and wrong.

When Bergen said to him, "There is a chance to make money," the plaintiff took the chance. So did Columbus. If Columbus had failed, he never would have discovered America. Having succeeded, we now, after 400 years of exploitation, celebrate Columbus Day. Thus with the arrangement of "The Day is Dark and Dreary," the plaintiff took a chance. If it had been musical, acceptable and accepted he would have been entitled to compensation, because services had been rendered. However, his services were on a contingent basis and the contingency went against him.

Plaintiff admits that the arrangement was far from satisfactory on the first rehearsal. He proceeded to correct it and instead of having it corrected in time so that the defendant could go over it and have it in form so the orchestra could play it at the final or dress rehearsal, the plaintiff delivered it through his daughter (by the way, Bergen may not have any money, but he certainly has the chivalry and the carefree-with-money manner of a musician, for did he not give her a fifty cent tip when the regulation tip is a dime) too late for study and when the orchestra attempted to play it, it found the arrangement for the harp and for some of the other instruments was grossly neglected and that it was mainly devoted to the bass clarinet, when he knew that the orchestra had no bass clarinet.

The opus was incomplete. Instead of having the director's score in its entirety, in one tome, as is prescribed by all the rules of music, it was left in such shape that the director would be obliged to use two scores, if he were capable of using two scores at the same time—a clash with the geometric law.

Imagine a director waving to the tympanum to vibrate pianissimo, or to the violin for an andante, and at the same time flit from score to score endeavoring to find the vocal parts. If we were not dealing with the classics, I would be tempted to say that such efforts would drive a director nuts.

Besides, it was proven beyond dispute that in the classical musical world, arrangements are offered on contingent basis. All of Bergen's more than a hundred compositions were published on a contingent basis. If accepted, a small stipend is received, with the expectancy that if satisfactory a publisher will print it and royalties may ensue.

Now, imagine the plaintiff suing Bergen for $85.00 for a score that is so incomplete, scratchy, full of discord and dissonance as his opus shows it to be. Opus is the musical term for a work of labor. Musicians do not labor. Nothing here need be

said reflecting upon the ability of the plaintiff, for even the greatest do not always create masterpieces. Michaelangelo and Raphael have done now and then some mediocre work, and even Richard Wagner and Beethoven at sometime or other, we dare say, have expressed themselves unsatisfactorily in their music.

This Court has had the distinguished advantage, never before afforded another court anywhere on earth, in determining the facts in the case. Its judicial judgment need not be grounded upon a mere dispute of evidence, or rest upon the credibility of witnesses and manner of their testimony, etc. The music was heard right in Court. With the aid of a piano and a quartet, the player at the piano and two of the singers being officers of the Court in good standing, demonstrated to the Court that the arrangement was really bad. Surely, these lawyers, officers of the Court would not wilfully deceive Your Honor by singing sour notes to help the defendant. Their reputations as lawyers may not yet have arrived, but their reputations as singers are par excellence. They were truthful singers, and they sang truthfully, and they sang as the score was written by plaintiff, and discord and dissonance came from their efforts that not only jarred Your Honor's ear, but it even gave the bailiff indigestion.

Your Honor learnedly stated from the bench that the only instrument you ever were able to play was a Jewish harp. Of course, that was the first Lyre of the ancients. Between a Jewish harp and a Scotch bagpipe, layman as I am, I am unable to state which produces the worst music, but I do know who does the most economical blowing.

The Court Room was vibrant, first, with the music as it was written by Bergen. How pleasing, soothing, enjoyable. It almost brought tears to the eyes of all in the courtroom, and then suddenly, as if struck by a hurricane, the air became charged with everything unmusical, a bedlam of blatancy broke out when the music as arranged by the plaintiff was attempted in the score.

It was plaintiff's duty to correct it? Did he do it? No. A thousand times No. The plaintiff does not dispute that there were errors in the score. The plaintiff does not dispute that the score was not accepted and was not played. He who seeks pay must do satisfactory work, even if it be an opus.

We respectfully submit that the plaintiff should never have started this action. He should be tickled to death that he is still among the living for his unpardonable crime in the musical world of having furnished a score that was neither fit for the song of man nor the braying of an ass.

The plaintiff, with the ego of a musician, proclaims himself a professional arranger of music.

Non quo, sed quo modo.

We ask that defendant be given judgment.

Respectfully submitted,

WM. B. RUBIN,

Attorney for defendant Bergen.

¶ THE late John Jay, once Minister to Austria, had this anecdote of Daniel Webster to narrate: "At a dinner party I once gave him, during the forties, he proposed the health of my father in these words: 'When the spotless ermine was dropped by Washington on John Jay's shoulders it touched a man not less spotless than itself.'"

GENTLEMEN OF THE JURY

By ROY C. NELSON
Elizabethton, Tennessee, Bar

It was in a small County seat Town of East Tennessee. The case had been hotly contested between the respective Attorneys for both the Plaintiff and the Defendant. The defendant was poor but respectable and an honorable farmer, his word was as good as his bond.

When the proof had been completed, and the attorney for the Plaintiff had finished his argument to the Jury, the defendant asked leave of the Court and of his Counsel to address the Jury. This was granted. His talk follows:

Your Honor—Gentlemen of the Jury: I realize under the laws of the State of Tennessee, I am entitled to my homestead exemptions, and my little farm is worth scarcely the full amount exempted by the law as I understand it. I realize that I may be permitted by the law to take advantage of this exemption should I desire. I further realize that I have made myself liable by endorsement for some other for the obligation upon which this suit is predicated and I realize that I could not be turned out of my premises. Yes I owe the note, at least I guaranteed to pay this amount if the principal should fail, I was an endorser a Surety for a friend. Why, because someone trusted me, my name was honorable, my name was a guarantee and was worth while on that note. A creditor is not to be treated as a hostile enemy it has been said he is not one robbing you. He but demands a fair show before the law to collect his debts and enable himself to acquire home and comforts, but sometimes I notice no sympathy is wasted on him.

Whatever may be the condition to which he and his are reduced by the default of the debtor, his rights might be forgotten while counsel stand here and argue for the last vested rights of myself and family. Nevertheless his rights are as dear to him as mine and should be so held by the Courts and the Jury.

The loss of a real homestead is, after all, no extraordinary grievance. The loser is still as well off as thousands of other good men, who pay what they owe and live in rented houses. A man who yields up his sacred homestead rights to pay his honest debts, "plants a flower in his rented lawn that will bloom while he lives as a token of honor, and shed a fragrance above his grave when he is gone that will endure forever," it has been said. It will be a treasure to his children and children's children when the shrubs he might have planted in an unfairly held homestead lawn might wither and fail to blossom in his honor and which he might have been able to keep by allowing his just and honorable debts to remain unpaid, and they might decay by lapse of time and be blown away in the revilings of those he defeated or defrauded of justice by refusing to render them their own.

Gentlemen of the Jury on that little homestead out there in "Happy Valley" I have lived a long time, I have been happy there with my dear children, it is there that I have with Serah my wife brought them to the Estate of men and women, there on the hillside in the little family plot where I have kept the evergreens growing year after year, where I have mowed and cared for the grass and planted rambler roses is my father and mother, and their father and mother where they sleep under

the giant oaks by the waters of the rippling Watauga. Yes on this dear old homestead my entire life has been spent as well as that of my ancestors since the beginning of Tennessee. There is the old mill where my father made his living for years, I can envision it now as I look across the fields of yesterday into the purple Autumn haze of another day. The old wheel ceased turning long ago. The last stick of timber in its ancient mechanism has rotted away and gone with the wind, the great Industrial Mills of the nearby Towns run by steam, electricity and mighty Diesel engines have conspired to destroy my simple trade as a miller and I have been forced for years now to eke out my existence as a one gallows farmer. Nevertheless Gentlemen of the Jury the memories that cling about this old homestead to me are most pleasant, but here and now in the presence of Almighty God, this Honorable Court and you Gentlemen of the Jury, may I say I am willing and do here and now surrender my Homestead, my exemptions under the Law to pay my lawful and honorable debts.

My conscience, my honor, and my responsibility as a citizen is greater to me than the EXEMPTION LAWS OF TENNESSEE.

AN OPENING PRAYER

(Delivered at The Bonar Law Memorial College, school for citizenship, at Ashridge in England)

Grant us O Lord the royal gift of courage that we may do each disagreeable duty at once: grant us a keen sense of honour, that we may never give ourselves the benefit of the doubt; that we may be especially just to those we find it hard to like, and may own up manfully when we have done wrong.

Grant us a true sense of humour; may its kindly light and its healing power relax life's tension.

Grant us restrained and well-ordered ambition so that we may not miss the things that are noble and beautiful.

And grant this that we may be true and loyal to the best and the highest that we know and we may show this truth and loyalty in every activity of our common life, and so live to thy glory.

NOVEMBER 1937

LAST WILL AND TESTAMENT OF A DREAMER

(With apologies to "The Will of Charles Lounsbury," by Williston Fish)

I A DREAMER, being of sound mind and body, but mindful of the uncertainties of this life, do make, publish, and declare this, my last will and testament, hereby revoking all former wills, bequests, and devises by me made.

FIRST: Worldly goods and material things of all kinds and wheresoever the same may be situate, but more particularly, to-wit: Personalty and realty of which the Law takes cognizance, I have none, so I do make no mention hereof.

SECOND: To mothers, I bequeath motherhood with all of its attendant heartaches, sacrifices, worries, and tears. And also to mothers I leave a life estate of toil, composed of housekeeping in all of its phases, appurtenances, and attendant labor thereto.

But I bequeath also to mothers, a helpmate for her aforesaid toil and labor, to-wit: One who is her provider, her champion, her protector, and her perennial lover until the day he dies. And I further bequeath to mothers, absolutely and without reservation, the riches which Midas himself could not possess, to-wit: tousled hair, chubby arms and legs, baby voices, the laughter of children, and the patter of little feet upon the floor. And to mothers I leave the incalculable pride and joy of seeing a golden haired lad and a dainty miss in pink organdy grow to manhood and to womanhood.

And finally to mothers I leave the deathless heritage which only they can enjoy, to-wit: a lasting and abiding Love between mother and offspring, the flame of which aforesaid Love shall always remain constant, bright, and true.

THIRD: To fathers, I devise a life estate of sweating toil and laborsome days, and also all of the necessary appurtenances of such toil, to-wit: heads that throb and bodies that ache with fatigue at the day's end. And also to fathers I devise an endless and never ending procession of financial responsibilities.

But also to fathers in addition to the aforesaid I leave a life partner to share such responsibilities and toil. And to fathers I leave, at the close of the day, the aforesaid life partner standing in the doorway ready to praise, advise, or console in accordance with his needs, and I leave too, chubby arms and legs to entangle themselves around his feet as he nears the gate.

And I bequeath to fathers an inexhaustible supply of fairy tales, of ghost stories, and narratives of brave and venturesome men. And finally to fathers I leave broad shoulders for weary tousled heads to rest upon, and strong arms to carry the owners of the

aforesaid tousled heads to their respective sleeping quarters.

FOURTH: To lovers, I leave the faltering and uncertain course of love, with all of its appurtenances and hereditaments, but more specifically as follows, to-wit: heartaches, misunderstandings, and petty jealousies. But also to lovers, I bequeath other appurtenances, to-wit: the golden moon, a million stars, the fragrance of flowers, soft breezes, sweet music, and innumerable shady lanes.

And I give to lovers the sweetness of kisses, and a host of Memories to remember when the Flame of Love flickers fitfully. And finally to lovers I devise the right to travel down the pathway of life together and inseparable, however, subject to all bequests and devises heretofore made to mothers and fathers.

FIFTH: To children I bequeath a school desk when the birds are singing and the fish are biting, a spacious lawn to mow when around the corner is heard the crack of a bat and the vociferous shouts of ball players, and a bed when the night seems so fanciful and delightful for play. But also to children I leave endless summer days to romp and play in, and the early hours of summer nights to enjoy and be happy in.

And to children I devise fairs and carnivals with their gaudily colored swings, their hurdy-gurdies, and their merry-go-rounds with gaily painted horses. And also to children I bequeath Circuses with all their appurtenances thereto, to-wit: clowns, calliopes, acrobats, elephants, horseback riders, and beautiful ladies.

And to children I leave hilltops to lie upon in the summer whilst gazing with wonder and awe at the fleecy white clouds in the blue sky, and I leave the selfsame hills to slide and be merry upon in the winter. And also I leave them silvery lakes to swim and disport in during the warm summer days, and I leave a glassy smooth surface on the aforesaid lakes to skate upon in the winter.

And finally to children, I devise a fireplace with burning logs, roasting apples, and crackling pop corn, to enjoy as long as they shall live. And I leave also to the aforesaid children the absolute and inalienable right to gaze into the flames of said fireplace thus conjuring and dreaming tales of goblins, kings, soldiers, and princesses.

SIXTH: All of the rest, residue and remainder of my estate, consisting of the following described property, to-wit: Memories not heretofore devised, greening trees, the sparkle of rain drops, faint pink dawns, vagrant breezes, blue skies, and golden sunsets, I leave to whomsoever shall desire, a life estate in the same, and charge only that the aforesaid rest, residue, and remainder shall be used with an end to perpetuating the same for succeeding generations.

SEVENTH: Having made all and every devise, I hereby constitute, authorize, and appoint the Godhead as Executor of this, my last will and testament, and I direct that He shall have absolute power of disposition according to the aforesaid terms.

Dated this 21st day of July, A. D., 1938.

A. DREAMER (*Seal*)

DOE *v.* ROE

A LAY PETITION

COMES now the plaintiff John Doe and complains and represents to this Court that on the 5th day of April 1934 the plaintiff John Doe was going North on High-way No. 73b, when plaintiff got north of the Satafa Rail Road between a cement culvert and a post and was walking off the cement slab of said high-way one foot and a half leading a hog, a coup

automobile with 2 men in it coming in the opposite direction struck the plaintiff in three places and struck and killed said hog, the plaintiff did not know the man but was informed later that the man that was a driving and owned the car was mr. Roe, The man smelled of boose it was said at the time he was boosy, It was a coup car Licence No. #24–1989, AV. F. H. G. R. R. Chev. Coup.

When this car struck plaintiff and his hog it was going at a break neck speed and killed plaintiff's hog instantly and injured plaintiff. That said hog was an educated hog well trained to lead and gentle, and was a show hog and valuable as a perade hog. Having been trained from a small pig up, And capable of earning a large sum of money for plaintiff as a show hog. Also said hog was a sow and had raised 2 litters of pigs of 8 pigs each litter. She was a high bred Chester white sow and since said hog was killed she could have easily of reaise 2 liters of 8 pigs each. That by reason of said defendant running his car into and hiting plaintiff and injuring plaintiff and killing plaintiff's hog, plaintiff has sustained damage to the sum of $350.00.

Wherefore plaintiff prayes this court for judgment against the defendant Mr. Roe in the sum of $350.00 and attorneys fee and for all costs in said case.

JOHN DOE
Plaintiff and attorney.

PETITION TO REMARRY

To the Hon. H. A. Sharp, Judge of the City Court of Birmingham, in Equity:

YOUR petitioner, Samuel Rice, of Mobile, Ala., would deferentially represent that on the 10th day of January in the year of grace 1891, your Honor dissolved the connubial ties theretofore existing between petitioner and his consort, Anna Rice, granting her divorce a vincula matrimonii, with the beatific privilege thereto annexed of marrying again—a privilege which it goes without saying she availed herself of with an alacrity of spirit and a fastidious levity disdaining pursuit. But on this vital point your Honor extended to petitioner only the charity of your silence. Petitioner has found in his own experience a truthful exemplification of Holy Scripture that it is not good for man to be alone and seeing an inviting opportunity to superbly ameliorate his forlorn condition, by a second nuptial venture he finds himself circumvallated by an Ossa-Pelion obstacle which your Honor alone has power to remove. His days rapidly verging on the sere and yellow leaf, the fruits and flowers of love all going, the worm, the canker and the grief in sight, with no one to love, and none to caress him, petitioner feels an indescribable yearning, longing and heaving to plunge his adventurous prow once more into the unvexed waters of the sea of connubiality. Wherefore, other refuge having none, and wholly trusting to the tendor benignity and sovereign discretion of your Honor, petitioner humbly prays that in view of the accompanying fiats of a great crowd of reputable citizens, giving him a phenomenally good name and fair fame, you will have compassion upon him and relieve him of the mortifying hymenial disability under which his existence has become a burden, by awarding him the like privilege of marrying again, thus granting him a happy issue out of the Red Sea troubles into which pitiless Fate has whelmed him. For comforting as the velvety touch of an angel's palm on the fever-racked brow, and soothing as the strains of an Aeolian harp when

swept by the fingers of the night wind and dear as the ruddy drops that visit these sad hearts of ours, and sweet as sacramental wine to dying lips it is, when life's fitful fever is ebbing to its close, to pillow one's aching head on some fond wifely bosom and breathe his life out gently there. And as in duty bound to attain the possibility of compassing such a measureless benediction, petitioner will ever pray without ceasing in accents loud and earnest as ever issued from celibate lips.

RHYMES OF A CORNFIELD LAWYER

INDIAN NAMES

At Stillwell, in the district court
  O'er in our eastern hills,
A trial will take place this week
  That will have many thrills.
For there the populace will sit
  With heavy, anxious breath
To hear who is responsible
  For a good Indian's death.

* * *

Not long ago, the riddled form
  Of Charley Terrapin
Was found out in a lonely wood
  Where it should not have been.
And now Charles Owl and Brother Sam,
  And Cat Owl, too, they say,
Are facing trial in a court
  Just like the white man's way.

* * *

John Choate is their big sheriff grim
  Who does the heavy work,
While true to form, John Six-killer
  Acts as the district clerk.
Judge Parks sits as the district judge
  This unique case to try
While Martin, Owl's attorney chief
  To stellar heights will fly.

* * *

And witnesses that will be heard
  Are: Buzzard, Fox and Sukey,
Tincup, Dirteater, Turtle, Coon
  And Mary Chu-wa-looky;
Fourkiller, Crow and Johnny Frog
  Tom Hawk and Bushyhead,
Canary, Bear, Sam Chickenroost
  And Jun Oct-te-yah Bread!!!

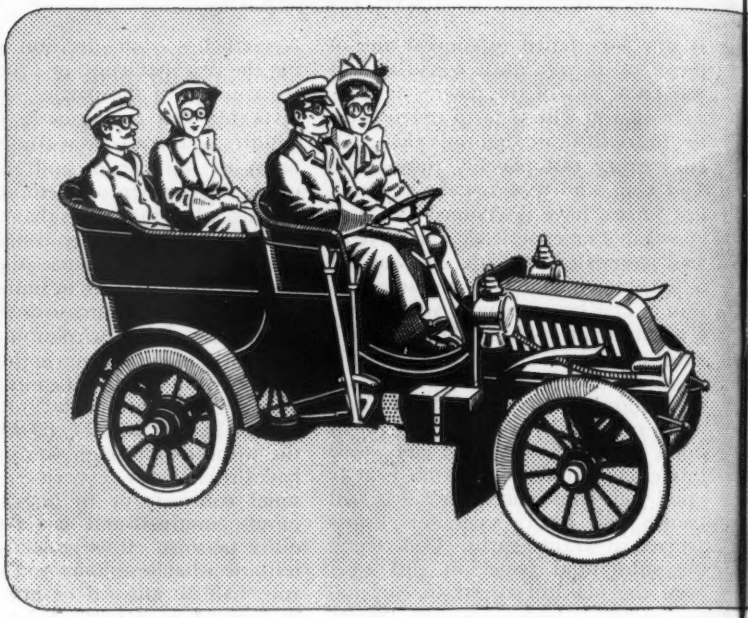
—*Theopeho*

FORMULA FOR PRELIMINARY INSTRUCTION TO JURIES

Submitted by Ernest B. Herald, Seattle, Wash.

LADIES and gentlemen of the jury, at the outset of this case I will make these preliminary observations to you since henceforth, and until I shall be called upon to instruct you concerning the law governing the case, during the progress of the hearing my voice must be to you like the voice crying out in the wilderness, unheard. It will be a grievous error on your part if at any time you should infer from my attitude or demeanor, by any word, act or deed, that I have any impression concerning the facts, the honesty of the parties or their counsel or the credibility of the witnesses. The law presumes that I am incapable of having any disinterested impression of these matters and that I would too much wrongfully influence you in the discovery of the truth. I am not to be trusted to participate in the alchemy of trials, whereby the baser metals of the testimony are transmuted into the golden verities. Therefore where the facts are concerned I am bound to hold myself aloof from you, even as the Brahmanic doctrines remove the untouchables. You may have observed that in your examinations touching your qualifications as jurors, particular effort has been made to delve into any possible knowledge or intelligence you may possess or experience you may have had which might aid you in analyzing the evidence in this case.

If you have failed to conceal any of these, or if you have revealed that you know any of the parties or their counsel, you will seem so untrustworthy to try this case that only the strictest inquiry can possibly purge you. And you, who now remain as qualified jurors, have disclaimed any such knowledge or experience and have at least concealed any alertness or intelligence which might arouse suspicion. The law presumes your qualifications as jurors from these antecedents, and thus choice falls quickly upon the elect. If your answers to these inquiries may have been somewhat colored by your desire to sit upon this case, you need not allow this circumstance to rest too heavily upon your consciences, since it is well known that justice sometimes comes arrayed in strange garbs. Concerning the substantial issues in this case, what the plaintiff asserts the defendant denies, both swearing under oath, and since they both cannot be truthful, it necessarily becomes your unpleasant duty to decide who of them is a liar and a perjurer. And of this question the law decrees that you are the sole and exclusive judges, but you must ever keep in mind that your decision must rest upon the evidence alone which has been able to pass through the procedural sieve. Since you have admitted that you have little, if any, knowledge or experience in the matters you are called upon to decide, presumably there will be no danger that you will apply any in coming to your decision on the facts. The exercise of any powers of deduction from experience, observation or common sense, the employment of the imagination, inference based upon like or similar transactions, all must be frowned upon. You are conclusively presumed to be reasonable and prudent persons, although no inquiry has ensued bearing upon these qualities and abilities. Nevertheless your decision concerning the reasonableness or prudence of the conduct of the parties will be irrevocable and conclusive. The law requires you to accept as true the testimony of the parties and their witnesses, however incomplete or unconvincing, when it appears that the same has not been expressly contradicted, unless some circumstance appears in the trial itself tending to indicate that the testimony is untrustworthy, such as interest of the witness in the results, or fault in his perception, memory, narrative or self-contradiction. You are presumed to be fully qualified to pass upon the credibility of the witnesses although you may have had little, if any, experience in personal contracts or in searching the minds, motives and consciences of other persons. It is my duty to determine what testimony and evidence you shall be allowed or not allowed to hear or consider. If by my rulings in this respect you may be perchance perplexed or disappointed, you should know that the judge is bound by many ancient, hard and rigid rules of law regulating the reception of evidence, wise and otherwise, the violation of which may easily overturn the results of all your completed labors here. It is also my duty to instruct you concerning the law governing this case, and you are to disregard all other laws. You shall apply the facts, as you find them, to this law, as I give it to you, and arrive at your decision on them alone, keeping yourselves bereft of all feelings, emotions, predilections, passions and prejudices, for the law presumes that you shall function in this assumed purity. Within the realm of the facts your powers are Jovelike and supreme, and when you have spoken, your voice is final. There is no earthly authority that can contradict you. If you should become perplexed in the interpretation or the weighing of



Be It Law or Transportation . . . **PRCI**

IN TRANSPORTATION

As you roll along a smooth highway, do you sometimes recall those dusty roads and the uncertainties of motoring in former years? And yet the mechanical principles of the automobile are much the same — the main difference is in their application.

IN LAW FINDING

When your next client's case sets you at the task of looking up the law, if you use American Jurisprudence you will be startled by the ease with which the law, its

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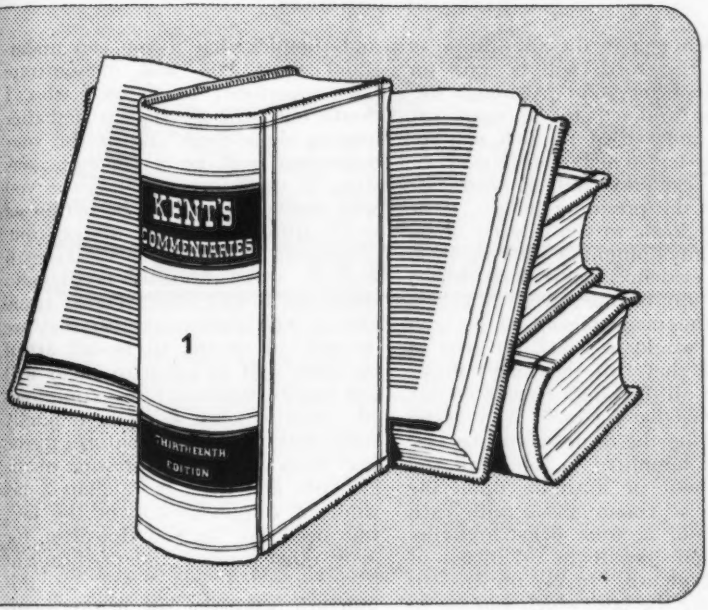


PRINCIPLES SELDOM CHANGE

limitations and exceptions are found in understandable terms. And yet the principle was roughly outlined in Kent's Commentaries in use years ago.

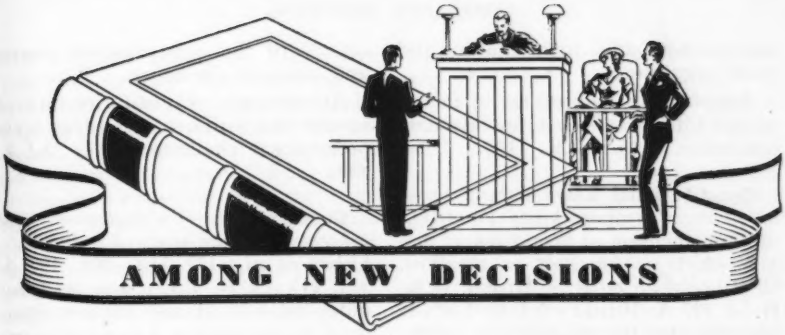
MEETING A POPULAR DEMAND

Both American Jurisprudence and the modern motor car are the result of a popular demand for an easier, more reliable source of knowledge and transportation. In the modern law office where speed and reliability count, American Jurisprudence offers an improved basis for the solution of your clients' problems.

CO. - - - - - **Rochester, N. Y.**

" - - - - - **San Francisco, Calif.**

the evidence or in the application of the law thereto, it will be vain for you to look for help. Although this court is supposed to be somewhat trained and skilled in such matters, it is powerless to help you. Under the law the evidence and the facts are taboo to the presiding judge. If he should indicate to you directly or indirectly any opinion or interpretation of the evidence, concerning which there is any dispute, even though it be by the mere raising of an eyebrow, it would so wreck the trial of this case that "all the king's horsemen and all the king's men could not put it together again." And at no time during the trial, before the case is finally submitted to you, shall you think about or meditate upon the evidence or communicate with each other about it, since belief and conclusions must await the submission of all the evidence. In my instructions concerning the law, which you are to apply to the facts in this case, I will scrupulously endeavor to make them literally without error, and in so doing they may be perhaps so labored and complex that if you can understand them you will demonstrate your superiority to counsel, who, I doubt not, will spend days hereafter arguing about them. But in this your experience will be a common one, since as the court cannot assist you with the facts so it will be permitted to do little to aid you in the comprehension of the law. Speaking of counsel, it is probably needless to warn you to pay little, if any, attention to their statements since they are deemed, of course, to be all artful partizans and to listen to them will but make confusion worse confounded. And so when this case is finally submitted to you, and you take to the jury room a fleeting impression of the evidence and little more than a bewildered comprehension of the law, you need not be too downcast for many other juries in like predicament have preceded you. And at this juncture, since the law seems apparently so devised to deprive you of all real guidance, it may be not amiss for you to initiate your deliberations with a prayer to God for guidance.



AMONG NEW DECISIONS

Appeal — *abandonment of right to appeal.* In Mason v. Red River Lumber Co. 188 La. 686, 177 So. 801, 115 A.L.R. 117, it was held that one who, after the rendition of a judgment against him in a state court sustaining an exception of no cause of action, has instituted an identical suit in a Federal court in which a judgment sustaining pleas of res judicata and no cause of action was rendered against him, from which no appeal was taken, will be deemed to have abandoned the right to appeal from the judgment of the state court.

Annotation: Abandonment of appeal or right of appeal by commencement, or prosecution to judgment, of another action, 115 A.L.R. 121.

Assignment — *letter as notice.* In Gibraltar Realty Co. v. Mount Vernon Trust Co. 276 N. Y. 353, 12 N. E. (2d) 438, 115 A.L.R. 322, it was held that a bank's receipt of a letter stating that a depositor's account has been assigned to the writer is insufficient, without presentation of the assignment, to preclude it thereafter from acting upon the depositor's subsequent direction to charge the account with a purchase of its stock.

Annotation: Sufficiency of notice to bank of assignment of deposit. 115 A.L.R. 328.

Banks — *deposit by agent in his own account of check designating payee as "agent."* In New York Life Insurance Co. v. Bank of Commerce & Trust Co. — Tenn. —, 111 S. W. (2d) 371, 115 A.L.R. 643, it was held that the rule that when a note or check is payable on its face to one as trustee, guardian, or administrator, the bank which accepts the paper for deposit or purchase is chargeable with notice that a conversion is being made by the payee or holder, does not extend to a case of business agency merely, so as to make a bank in which a check designating the payee as "agent" was deposited by such payee to his individual account liable to the principal for the amount, where the bank had no notice of the agent's fraudulent purpose or want of authority, and did not participate in the misappropriation.

Annotation: Deposit to individual account of checks or notes drawn or indorsed by agent or fiduciary as charging bank with notice of misappropriation. 115 A.L.R. 648.

Commerce — *state license tax on motor vehicles.* In State v. Public Service Commission, — Mo. —, 108 S. W. (2d) 116, 115 A.L.R. 1097, it was held that a tax imposed by a state upon an interstate motor vehicle carrier for the use of the highways of the state is not an unconstitutional burden on interstate commerce if it is a reasonable charge and a fair contribution to the expense of highway

construction and maintenance and traffic regulation.

Annotation: License tax or fee on automobiles as affected by interstate commerce. 115 A.L.R. 1105.

Constitutional Law—*making proof of financial responsibility condition of nonsuspension of license where motor vehicle is involved in accident.* In Rosenblum et al. v. Griffin, — N. H. —, 197 A. 701, 115 A.L.R. 1367, it was held that the validity of a statute requiring the suspension of the license of the driver and of the certificate of registration and plates of the owner of a motor vehicle involved in an accident, irrespective of culpability, until the giving of security to satisfy any judgments for damages resulting from such accident which may be recovered by or on behalf of the aggrieved person, and until such owner or operator shall immediately give and thereafter maintain proof of financial responsibility in the future, is not affected by the discrimination thereby made among innocent persons between those escaping and those not escaping accident as the result of the negligent operation of another car.

Annotation: Constitutionality of statute which makes proof of financial responsibility condition of granting, or of nonsuspension of, automobile registration license, or driver's license. 115 A.L.R. 1376.

Constitutional Law — *statute as to disqualification of judge.* In Austin v. Lambert, — Cal. (2d) —, 77 P. (2d) 849, 115 A.L.R. 849, it was held that a statute providing that a party to a civil action or his attorney may peremptorily challenge a judge assigned to hear the cause, whereupon, without any further act or proof, another judge shall be assigned, is unconstitutional as an unwarranted interference with the constitutional powers and duties of the courts.

Annotation: Constitutionality of statute which disqualifies judge upon peremptory challenge. 115 A.L.R. 855.

Corporations — *compensation of protective committee.* In Lewis v. Fisher et al., 172 Md. 201, 197 A. 571, 115 A.L.R. 555, it was held that independently of any express agreement on the subject, a committee representing bondholders is entitled to reasonable compensation for services rendered in good faith pursuant to such an engagement.

Annotation: Right of protective committee, its attorney, or employee, representing stockholders, bondholders, or other creditors, to compensation for expenses and services. 115 A.L.R. 559.

Costs and Fees — *allowance of attorney's fee.* In Nels Swanson v. Gnose, — Mont. —, 76 P. (2d) 643, 115 A.L.R. 244, it was held that an action on a claim against a decedent's estate for unpaid wages by one whose claim, filed in the administration proceeding for an amount in excess of that recovered, had been rejected, was, where the administrator did not follow either the course open to him of allowing the claim in part, or the course of seeking to have it referred to some disinterested person, "necessary" within a statute providing that whenever it shall become necessary for an employee to maintain a suit at law for the recovery of wages due, the judgment shall include a reasonable attorney's fee.

Annotation: Construction and application of statute providing for attorney's fee in action to recover for wages. 115 A.L.R. 250.

Courts — *conflicting jurisdiction.* In Byrd-Frost, Inc. v. Elder et al.,

93 F. (2d) 30, 115 A.L.R. 342, it was held that the rule that in actions in rem or quasi in rem where the jurisdiction of a state court has first attached, a Federal court of concurrent jurisdiction is precluded from exercising its jurisdiction over the same res to defeat or impair the state court's jurisdiction, is designed not to afford litigants a refuge of threatened double liability in personam, but to avoid unseemly conflicts between courts, in the interest of comity.

Annotation: Danger of being subjected to double liability in respect of the same obligation as ground for abatement of, or injunction against, action by one claimant pending an action, otherwise in personam, by a rival claimant. 115 A.L.R. 346.

Courts — *jurisdictional amount in suit for declaratory judgment.* In Vernon J. Davis v. American Foundry Equipment Co. 94 F. (2d) 441, 115 A.L.R. 1486, it was held that a suit for a judgment declaratory of the validity of a contract calling for payments aggregating more than the requisite jurisdictional amount is within the jurisdiction of a Federal court, although the total of payments accrued is less than such amount.

Annotation: Jurisdictional amount in its relation to suit for declaratory judgment. 115 A.L.R. 1489.

Death — *right of action for death caused by breach of implied warranty as to fitness of food.* In Greco v. S. S. Kresge Co. 277 N. Y. 26, 12 N. E. (2d) 557, 115 A.L.R. 1020, it was held that the breach of a seller's implied warranty of the fitness of food for human consumption is a "default" or "wrongful act" within a statute giving the personal representative of a decedent, for the benefit of the surviving spouse or next of kin, a right of action for damages for a wrongful act, neglect, or default by which decedent's death was caused, against one who would have been liable to an action in favor of the decedent by reason thereof if death had not ensued.

Annotation: Contractual relationship as affecting right of action for death. 115 A.L.R. 1026.

Deeds — *description of property conveyed.* In Hoover v. Roberts, 146 Kan. 785, 74 P. (2d) 152, 115 A.L.R. 182, it was held that where a warranty deed grants and conveys "the undivided one-eighth interest of the grantor, being all of the interest of the grantor as the heir at law and devisee under a last will," of the testator, it is held, in view of the circumstances surrounding the execution and delivery of such deed, narrated in the opinion, the grantor conveyed his entire interest, which was in fact an undivided one-fifth interest.

Annotation: Which of conflicting descriptions in deeds or mortgages of the extent of the interest conveyed prevails. 115 A.L.R. 192.

Dentists — *right of registered nurse to administer anesthetic under direction of licensed dentist.* In State v. Borah, — Ariz. —, 76 P. (2d) 757, 115 A.L.R. 254, it was held that dentists, whose right to administer anesthetics in the practice of dentistry is recognized by statute, are licensed surgeons within a statute permitting a registered nurse who has taken a course in anesthesia to administer anesthetics under the direction of and in the immediate presence of a licensed physician or surgeon.

Annotation: Dentist as a physician or surgeon within statutes. 115 A.L.R. 261.

Election of Remedies — *breach of construction contract by contractee.* In Underground Construction Co. v. Sanitary District of Chicago, 367 Ill. 360, 11 N. E. (2d) 361, 115 A.L.R. 57,

it was held that a contractor entitled under his contract to receive monthly progress payments which have not been made is not limited to a choice between treating the contract as rescinded and recovering for the work performed, or continuing the work and suing on instalments as they become due, or completing the work and suing for the entire balance of the contract price, but may elect to suspend work until the accrued instalments are paid and later sue for special damages arising out of the delay.

Annotation: Right of building or construction contractor to recover damages resulting from delay caused by default of contractee. 115 A.L.R. 65.

Estoppel — *promissory estoppel.* In Fried v. Fisher et al. 328 Pa. 497, 196 A. 39, 115 A.L.R. 147, it was held that an estoppel may arise from the making of a promise, even though without consideration, if it was intended that the promise be relied upon and in fact it was relied upon, and a refusal to enforce it would be virtually to sanction the perpetration of fraud or result in other injustice.

Annotation: Promissory estoppel. 115 A.L.R. 152.

Evidence — *as to materiality of misrepresentation in application for life insurance.* In Metropolitan Life Insurance Co. v. Becraft, — Ind. —, 12 N. E. (2d) 952, 115 A.L.R. 93, it was held that in an action on a life insurance policy liability on which is contested because of the alleged falsity of statements in the application, it is proper to ask an employee of the insurer, whose duty it was to pass upon the application for the policy involved, whether if he had known the alleged facts he would have approved the application.

Annotation: Admissibility and weight on question of materiality of misrepresentation, of testimony of officers or employees of insurer to effect that application would not have been accepted but for the misrepresentation, or that there was a rule or policy to reject risks of the kind that would have been shown but for the misrepresentation. 115 A.L.R. 100.

Evidence — *blood test.* In Arais v. Kalensnikoff, — Cal. (2d) —, 74 P. (2d) 1043, 115 A.L.R. 163, it was held that a blood test shows the presence in the blood of a child of an agglutinating substance which is not present in the blood of the mother and that such substance is not found in the blood of a person alleged to be the child's father is not conclusive, in an action involving the determination of the child's parentage, that such person is not the father, where there is testimony that he had been seen at the mother's home on many occasions, that he paid the nurse who attended the mother at the birth of the child, and brought groceries and clothing for the child, and that he had told various persons that the child was his.

Annotation: Blood test to establish identity or relationship. 115 A.L.R. 167.

Evidence — *inculpatory statements made in presence of accused and not denied by him.* In People v. Kozlowski, 368 Ill. 124, 13 N. E. (2d) 174, 115 A.L.R. 1505, it was held that where charges of crime are made in the presence of the accused under circumstances such that he is in no position to deny them, or if his silence is of such a character that it does not justify the inference that he should have spoken, or if in any way he is restrained from speaking, either by fear, doubt of his rights, instructions given him by his attorney, or a reasonable belief that it would be better or safer for him if he kept silent, the statements themselves and the fact

that the accused kept silent are not admissible in evidence against him; but if the circumstances do allow the accused to speak, and if they show that the ordinary person thus situated would naturally deny the accusations made against him, his silence and the accusatory statement may be received in evidence as amounting to an admission against interest.

Annotation: Admissibility of inculpatory statements made in presence of accused and not denied or contradicted by him. 115 A.L.R. 1510.

Evidence — *Physicians — malpractice in failure to take X-ray.* In Kuhn v. Banker, 133 Ohio St. 304, 13 N. E. (2d) 242, 115 A.L.R. 292, it was held that in localities in which accepted medical and surgical practice requires that, if, after proper setting of the parts of the broken neck of a femur by the attending physician, and a bony union has formed, there is a grating sensation in the broken parts, an X-ray photograph should be taken to determine whether there has been disunion of the parts through absorption, so that the broken bone may be reset if it has become disunited, the failure of the attending physician who has been in charge of the patient from the beginning to cause or advise the taking of such a photograph on learning of the grating sensation, until it is too late to reset the bone, the parts of which have become disunited through such absorption, is evidence of the negligence or unskilfulness of the attending physician amounting to malpractice and warrants the submission of that issue to the jury.

Annotation: Liability as for malpractice as affected by failure to take or advise the taking of an X-ray picture after operation, or to resort to other means of determining advisability of a supplementary operation or special treatment. 115 A.L.R. 298.

Evidence — *presumption of death as evidence.* In Tyrrell v. Prudential Insurance Co. 109 Vt. 6, 192 A. 184, 115 A.L.R. 392, it was held that in determining whether one whose death is presumed from his disappearance for a period of seven years died prior to a certain date within the seven-year period it is not proper to take into consideration the presumption of death arising at the expiration of the period.

Annotation: Presumption of death as evidence. 115 A.L.R. 404.

Executors and Administrators — *notice to one of several coexecutors.* In Irwin v. Larson, 94 F. (2d) 187, 115 A.L.R. 386, it was held that notice in ordinary matters to one of several coexecutors or coadministrators is notice to all.

Annotation: Presentment of claim or notice to one or more coadministrators, coexecutors, coguardians, or cotrustees as presentment or notice to all. 115 A.L.R. 390.

Fraud — *failure of bank to disclose facts to purchaser of its stock.* In Goess v. Shops, Inc. 93 F. (2d) 449, 115 A.L.R. 264, it was held that failure of a bank to disclose to an intending buyer of its stock, which was an unlisted one bought and sold in small quantities, that it is customary for brokers having any of the stock for sale to ask the bank for a firm bid, is not fraud entitling the purchaser to rescind, where the bank did not always bid for stock offered, and no agreement between the brokers and the bank to rig the market was shown.

Annotation: Market manipulation of securities. 115 A.L.R. 271.

Highways — *injury resulting from negligence of independent contractor.* In Wright v. Tudor City Twelfth Unit, Inc. 276 N. Y. 303, 12 N. E. (2d) 307, 115 A.L.R. 962, it was held

that the employer of an independent contractor hired to clean with soap and water rubber mats from an hotel lobby may, if aware that the work is being done on the sidewalk of a busy street, be held liable for injury to a pedestrian who slipped upon a mat and fell.

Annotation: Independent contractor rule as applied to injuries resulting from conditions created by independent contractors in streets. 115 A.L.R. 965.

Highways — *negligence of street railway company leaving loose stone in street after making repairs.* In Payne v. City of New York, 277 N. Y. 393, 14 N. E. (2d) 449, 115 A.L.R. 1495, it was held that it cannot be said as a matter of law that a street railroad company, in repairing the street between its tracks, was not negligent in leaving lying on the street a loose cobble which was thrown by the wheel of a passing automobile with such violence as to injure the driver of another car.

Annotation: Liability for injury to person or damage to property from stone or other object on surface of highway thrown by or from passing vehicle. 115 A.L.R. 1498.

Indictment — *reckless driving.* In People v. Green, 368 Ill. 242, 13 N. E. (2d) 278, 115 A.L.R. 348, it was held that an information charging in the words of a statute defining reckless driving that defendant drove a vehicle upon a public highway situated within a certain city, with a wilful or wanton disregard for the safety of persons or property, which does not state the specific acts on which the charge was based and the time and place of their commission, is insufficient.

Annotation: Sufficiency of indictment or information charging in words of statute offense relating to operation of automobile. 115 A.L.R. 357.

Insurance — *age of driver.* In Taylor v. United States Casualty Co. 269 N. Y. 360, 199 N. E. 620, 115 A.L.R. 822, it was held that the fact that an automobile was at the time of the accident being operated by the owner's seventeen-year-old son, holding a junior operator's license, in violation of the restrictions imposed on junior licensees, does not entitle a liability insurer to the immunity afforded by a policy provision excluding any obligation thereunder while the automobile is being driven "by any person under the age fixed by law" or under the age of fourteen years.

Annotation: Automobile insurance: exclusion clause relating to age of driver. 115 A.L.R. 827.

Insurance — *depreciation of insured building as affecting recovery.* In McIntosh v. Hartford Fire Insurance Co. — Mont. —, 78 P. (2d) 82, 115 A.L.R. 1164, it was held that the liability of an insurer in case of a partial loss of the building insured, the cost of repairing of which is less than the amount of the insurance, is the cost of making such repairs, with new materials where necessary, as will restore it to the condition in which it was before the fire, and not such cost depreciated to the extent to which the building is found to have depreciated since its construction, where a statute provides that if there is no valuation in the policy, the measure of indemnity in an insurance against fire, is the expense, at the time that the loss is payable, of replacing the thing lost or injured in the condition in which it was at the time of the injury.

Annotation: Depreciation of value of insured building because of age at time of loss as a factor in determining

the amount of a partial loss under insurance policy. 115 A.L.R. 1169.

Insurance — *interest in proceeds of creditor named beneficiary.* In Dunn v. Second National Bank of Houston et al., — Tex. —, 113 S. W. (2d) 165, 115 A.L.R. 730, it was held that a creditor named as a beneficiary in a life insurance policy may after the death of the insured collect the amount due according to the terms of the policy, even though it may exceed the debt in amount, and even if the debt has been paid, but may retain for himself only the amount of the debt due at the death of the insured together with any such amount as he may have paid to preserve the policy, holding the proceeds in excess thereof as trustee for the estate of the insured.

Annotation: Rights in respect of proceeds of life insurance under policy naming creditor as beneficiary. 115 A.L.R. 741.

Insurance — *limiting indemnity for accident to time insured is under regular care of physician.* In Lustenberger v. Boston Casualty Co. — Mass. —, 14 N. E. (2d) 148, 115 A.L.R. 1055, it was held that the word "care" as used in the provision of an accident insurance policy limiting the period for the payment of indemnity to the time during which the insured shall be under the regular care of a legally qualified physician or surgeon imports charge, oversight, watchful regard, and attention.

Annotation: Provision of accident or health insurance policy that insured shall be under care of physician or surgeon. 115 A.L.R. 1062.

Intoxicating Liquors — *sale to minor.* In State v. Schull, — S. D. —, 279 N. W. 241, 115 A.L.R. 1226, it was held that lack of knowledge that the purchaser was under the age of eighteen and that the sale to him was in good faith is no defense to a prosecution for violating a statute which in declaring it to be unlawful for a licensee to sell or give any nonintoxicating beer or wine to any person under the age of eighteen years does not make it a condition of liability thereunder that the offense be knowingly committed.

Annotation: Criminal offense of selling liquor to minor (or person under specified age) as affected by ignorance or mistake regarding purchaser's age. 115 A.L.R. 1230.

Judgment — *fraud in service of process as defense to action on foreign judgment.* In Wyman v. Newhouse, 93 F. (2d) 313, 115 A.L.R. 460, it was held that one against whom judgment was obtained through fraud in the service of process is not required to proceed against the judgment in the state in which it was rendered, but may set up want of jurisdiction to render it as a defense when sued thereon in another state.

Annotation: Judgment of court of a state in which the defendant was personally served as subject to attack in another state upon the ground that he was not properly subject to service or that the service or his appearance was the result of fraud or mistake. 115 A.L.R. 464.

Labor Relations Board — *power to require employer to withdraw recognition of company union as representative of employees.* In National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc., et al., — U. S. —, 82 L. ed. (Adv. 524), 58 S. Ct. 571, 115 A.L.R. 307, it was held that the making of an order by the National Labor Relations Board which, in addition to ordering an employer to cease from dominating an organization of its employees, requires it to withdraw all recognition of such

organization as the representative of its employees, and to post notices informing them of such withdrawal, is within the power conferred by § 10 (c) of the National Labor Relations Act of July 5, 1935 (49 Stat. at L. 449, chap. 372), to take such affirmative action as will effectuate the policies of the act.

Annotation: Construction and application of National Labor Relations Act. 115 A.L.R. 314.

Landlord and Tenant — *inability to relet premises on tenant's default.* In Re Garment Center Capitol, Inc., 93 F. (2d) 667, 115 A.L.R. 202, it was held that a lessor will be deemed to have exercised due diligence in exercising the right under the lease to relet the leased premises as agent for the defaulting lessee, so as to be entitled, upon failure to relet, to recover the full amount of rent reserved for the residue of the term, where when the lessee vacated the floor rented by him about 65 per cent of the building was unrented, the vacant parts of which were more desirable than the floor vacated, the renting season was then over, and the premises were listed with various brokers and advertised in a trade paper as available for rent, and although the rent asked was greater than that fixed by the lease, it was well known that the asking price was nothing more than a basis for negotiation, and although any lease would have been for a further term commencing at the expiration of the lease in question, with a right of occupancy before then and a concession in rent for the interval.

Annotation: What amounts to due diligence by landlord to relet premises as regards mitigation of damages as to tenant. 115 A.L.R. 206.

Landlord and Tenant — *option to purchase.* In Helbig v. Bonsness, — Wis. —, 277 N. W. 634, 115 A.L.R. 373, it was held that an option to purchase realty, given to a lessee concurrently with the lease of the premises without independent consideration, must be regarded as being in consideration of performance by the lessee of the covenant to pay rent and may not be exercised by him after abandoning the premises without paying any part of the rent.

Annotation: Lessee's breach of lease agreement as affecting his right in respect of option to purchase leased property. 115 A.L.R. 376.

Landlord and Tenant — *termination of lease by insolvency of tenant.* In Re Wil-Low Cafeterias, 95 F. (2d) 306, 115 A.L.R. 1184, it was held that the word "insolvency," as used in a provision of a lease authorizing the lessor to re-enter in case of the insolvency of the lessee, means a failure of the lessee to meet obligations as they mature, or such insolvency as throws the lessor's relations into confusion, delays payment of the rent, impounds his property for an indefinite time, and in general makes it important for him to be free to re-enter.

Annotation: Provision of lease authorizing its termination by lessor in event of insolvency, bankruptcy, or receivership of lessee. 115 A.L.R. 1189.

License — *extracurricular school activities.* In State Tax Commission v. Board of Education, 146 Kan. 722, 73 P. (2d) 49, 115 A.L.R. 1401, it was held that where a school board or board of education provides for and sponsors a program of educational activities and makes a charge for admission to some or all of them, in order that it be exempt from collecting and remitting the tax imposed by Laws 1937, chap. 374, § 3 (e), it must appear the entire amount of the receipts from the sale of admissions was expended for educational purposes.

Annotation: Admission charges or other receipts from extracurricular activities of schools as subject to taxation. 115 A.L.R. 1411.

License — *sale at retail within meaning of license tax law.* In Herlihy Mid-Continent Company et al. v. Nudelman, 367 Ill. 600, 12 N. E. (2d) 638, 115 A.L.R. 485, it was held that contractors for the construction of concrete sewers and tunnels, and for the building of sewage treatment works, are not, in respect to the materials incorporated in the completed structures, and not susceptible of salvage, sellers of such materials at retail within a statute imposing a tax upon persons engaged in the business of selling tangible personal property at retail and defining "sale at retail" as any transfer of the ownership of or title to tangible personal property to the purchaser for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration. [Overruling Blome Co. v. Ames, 365 Ill. 456, 6 N. E. (2d) 841, 111 A.L.R. 940, so far as it applies to construction contractors who furnish labor and materials in excavating for basements, sewers, water mains, or other purposes, or in the erection of foundations or buildings, or in the making of structural repairs to buildings.]

Annotation: What amounts to sale at retail within tax acts. 115 A.L.R. 491.

Mortgage — *mortgagee in possession.* In Jasper State Bank v. Braswell, — Tex. —, 111 S. W. (2d) 1079, 115 A.L.R. 329, it was held that a mortgagee lawfully in possession has the right to retain possession until his debt is paid, even though the debt is barred by limitation.

Annotation: Right of mortgagee lawfully in possession, or one entitled to his rights, to retain possession until debt is paid, although debt or right to foreclose is barred by limitation. 115 A.L.R. 339.

Mortgage — *right of assignor to fix rights and interests of parties.* In Re Title & Mortgage Guaranty Co. 275 N. Y. 347, 9 N. E. (2d) 957, 115 A.L.R. 35, it was held that an assignor of a part of a bond and mortgage or other assignable chose in action may, by the terms of the assignment, fix the rights and interests of the assignor and assignee.

Annotation: Priority as between holders of different notes or obligations secured by the same mortgage (or vendor's lien) or mortgages executed contemporaneously. 115 A.L.R. 40.

Municipal Corporations — *ordinance on subject covered by state law — tourist camps.* In Spitler v. Munster et al. — Ind. —, 14 N. E. (2d) 579, 115 A.L.R. 1395, it was held that a municipal ordinance regulating tourists' camps which provides that no person shall remain a resident of a tourist camp for a period of more than thirty days, under a penalty for each day's violation, and that sleeping rooms shall contain 500 cubic feet of space for each person housed, although less space is required by a state regulation, is not unreasonable and is not repugnant to and does not conflict with a state statute which provides for the licensing and regulation of tourist camps and provides that the state board of health shall have general supervision of the health and sanitary condition of such camps, but which does not expressly reserve to the state exclusive control over their regulation and indicates an intention to provide general rules and regulations only, such as are appropriate for camps without regard to

whether they are located in rural or urban communities.

Annotation: Establishment, maintenance, and regulation of tourist or trailer camps by public authorities. 115 A.L.R. 1398.

Pleading — *action for killing of animal by train.* In Missouri Pacific Railroad Co. v. Burrow, — Ark. —, 115 S. W. (2d) 262, 115 A.L.R. 1071, it was held that a complaint in an action against a railroad company for the killing of an animal by a train which alleges that the animal was killed on or about a day named, but that plaintiff has no knowledge of the number of the train or the direction in which it was traveling, but which does not allege that he has no knowledge or information enabling him to make a more definite statement as to the time when the animal was killed, is subject to a motion to make more definite and certain.

Annotation: Sufficiency of complaint in action against railroad for killing or injuring person or livestock as regards time, and direction and identification of train. 115 A.L.R. 1074.

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Pleading — *statement of cause of action in separate counts.* In Wells v. Douglas Wildin, — Iowa, —, 277 N. W. 308, 115 A.L.R. 169, it was held that inconsistent causes of action between which a plaintiff seeking to recover damages for personal injuries sustained in an automobile accident may be required to elect are not set forth by a petition one count of which alleges that he was on an errand for his employer, who was the driver of the car and against whose personal representative the action was brought, and therefore entitled to recover if ordinary care was not exercised in its operation, and the other count of which alleges that as a guest he was entitled to recover because of the recklessness of the driver.

Annotation: Propriety and effect of including in plaintiff's pleading in action for negligence diverse or contradictory allegations as to status or legal relationship as between parties or as between party and third person. 115 A.L.R. 178.

Prohibition — *to control administrative officer.* In Whitten v. California State Board of Optometry, 8 Cal. (2d) 444, 65 P. (2d) 1296, 115 A.L.R. 1, it was held that where the office of the writ of prohibition is limited by the state Constitution to the restraint of a threatened exercise of the judicial power in excess of jurisdiction, it does not lie to an officer or board exercising purely ministerial functions.

Annotation: Availability of writ of prohibition as means of controlling administrative or executive boards or officers. 115 A.L.R. 3.

Proximate Cause — *violation of statute as to cutting corners.* In Farmer et ux., v. School District No. 214, 171 Wash. 278, 17 P. (2d) 899, 115 A.L.R. 1171, it was held that the cutting of the corner by a bus in making a left turn into an intersecting street, in violation of a statute requiring one making a left turn to proceed beyond the center of the intersection before turning, cannot be said as a matter of law to have been the proximate cause of a collision between the bus while turning and an automobile attempting to pass it, where the driver of the automobile was familiar with the route of the bus and knew it would turn left either at that intersection or the next, and the bus driver's signal of an intention to turn might have been seen by the driver of the automobile.

Annotation. Automobiles: cutting corners as negligence. 115 A.L.R. 1178.

THE HUMOROUS SIDE

A Dumb Decision.

SIGN LANGUAGE INSULTS RULED OUT

PARIS—An insult in the sign language carries no weight in the Paris courts.

This was decided when a deaf-mute woman hauled her husband into court and complained he had insulted her. The judge appointed a sign language expert to look into the matter and the latter decided that what the husband had said was very grave, indeed.

A check with the law books, however, revealed that insults must be "overheard" by witnesses before action may be brought. The case was dismissed.

Perfect Enunciation Needed. A sentence of thirty days in jail was not very pleasing to the hobo. The fields were green and the countryside beckoned alluringly. A harsh mutter issued from his lips as he was led away. The Judge acted swiftly. "Bring that man back here." To the recalcitrant he said: "You had better be careful or I will make that ninety days instead of thirty." "Judge you misunderstood me" sobbed the prisoner "all I Said was God and the Judge."

An Emphatic Receipt. Received of J. D. one hundred dollars payment in full for all immaginary and other claims for all time from the birth of Adam to the death of the Devil. Should I ever forget the laws of all common decency and use your tacits to extort money from one that has fed you for the last five years I certanly would use my left hand to sign the check for fear that the ruler of the universe would paralize the hand that signed it.

Biting the hand that has fed you for the last five years is becoming very popular with all new dealers such as you.

Contributor: Carl N. Weilepp, Standard Life Bldg., Decatur, Ill.

Ad. in N. Y. Times. "LAWYER Disgusted With Conditions Will Take Job As: Dishwasher, Business Executive, Musician, Bodyguard, Traveler, Diplomat, Truck Driver, Writer or Anything Else Anywhere, Paying Decent Salary. A 660 Times Downtown."

Contributor: Harry Balterman, N. Y. City.

We Have Seen It Tried. In a recent case in Camden, N. J. counsel for defense was interrogating a lady witness whose responses evidently were not to his liking for he asked the same question time and again. Her attorney protested to the court over this cluttering of the records. To which attorney for defense said: "I can ask this question as often as I care to as I'm attacking the witness' credibility—to which opposing attorney said, "Your Honor, I don't think my client's credibility is being attacked—I think he's attacking her durability."

Try This on Your Wife. "Why do you use such peculiar terms?" asked a lawyer's wife of her husband who had returned worn out by his day's labors. "I don't see how you can have been working all day like a horse."

"Well, my dear," he replied, "I've been drawing a conveyance all day; and if that isn't working like a horse, what is it?"

Retold Tales.

Perfectly Matched. In a suit for separation, counsel for the plaintiff pleaded, among other reasons, incompatibility of temperament. He depicted the character of the husband as "brutal, violent and passionate." The husband's advocate rose in his turn, and described the wife as "spiteful, short-tempered, and sulky."

"Pardon me," interrupted the judge, addressing both limbs of the law; "I cannot see,

gentlemen, where the incompatibility of temperament comes in."

Retold Tales.

Marriage by Proxy. Here the marriage was plainly to secure a status which should admit the alien, it had not been consummated, in spite of the startling assertion in one of the plaintiff's letters that it had been "consummated by proxy."

1201 3rd St.,
Sacramento, Calif.
Feb. 16, 1938.

Justice of the Peace, Barridge,
Fontana, Calif.
Your Honor

As a law abiding citizen I hereby plead guilty. However, although I am aware of the fact that sentiment does not support my cause, I may ask your honor to look at my case with a sense of laxative mercy as I am now unable to meet the situation financially. I rest, therefore, my hope on your honor's consideration.

Most respectfully,
Graciano Bantista.

Contributed by: John A. Hadaller,
San Bernardino, Calif.

Marriage Lottery. Two Negroes who had not seen each other in five years discovered each had been married during this time.

"What kinda woman did you-all get, Mose?" asked Rastus.

"She's an angel, Rastus, dat's what she is."

"Boy, you sho is lucky. Mine's still livin'," Rastus muttered sorrowfully.

From: The Rail

A Gay Lothario. Lemmie Love was convicted of Breach of Promise in Love v. State, 23 Ala. App. 363, 125 So. 685.

Gleanings From a Shorthand Reporter's Notes. Cross examination of a character witness in a divorce case in the Corporation Court of Bristol, Virginia.

X. You live in Bristol while your husband don't want you and when he decides he wants you, you live in Kentucky?

A. I go back to him.

X. You are sorta of a will o' the wisp then?

A. No, I'm not what you call it, I try to be just as decent as I can be.

. . . . . .

Cross examination of a negro Porter from Bledsoe County in the dynamite murder trial in Carter County:

X. You don't stay in the Hotel at night, do you?

A. No, sir.

X. And after you leave the Hotel at night and go home to your wife, of course, you don't know what happens, do you?

A. Yes, sir.

. . . . . .

On argument on motion for new trial in the case of State of Tennessee vs. White Miller Tollett et al.:

Defense Counsel:

There is no evidence of any intention to kill anybody even by the confessors themselves.

The Court:

No proof to that?

Defense Counsel:

No proof. There is no proof that they knew this house belonged to Harmon Gouge, that he lived there or that anyone was there.

The Court:

Do you mean to tell me they came up here 235 miles to blow up a house just for fun?

. . . . . .

Cross examination of complainant in partition suit in the Chancery Court of Carter County:

X. But the taxes had already been paid when you filed your bill?

A. You've locked the barn after the horse is gone! What good does that do?

Contributor: Ruth E. Rouse,
Elizabethton, Tenn.

Presence of Mind. — *Office Boy*: "Sorry, madam, but attorney Snifkins has gone to lunch with his wife."

The Wife: "O! Well . . . tell Mr. Snifkins his typist called."—*London Tit-Bits.*

Ammonia. One day when my secretary was out of the office, a colored woman appeared at my door while I was talking over the 'phone.

After finishing my conversation, she said: "Is you a lawyer?"

"That's my profession," I replied.

"Can you get me a divorcement?" came the query.

To which I said: "I can, if you have grounds."

"Yes, Sir, Mr. Lawyer," she told me, "I'se got lots of grounds, but what I'se interested in is ammonia."

The court granted her a divorce, but no ammonia.

Contributor: H. I. Aston,
McAlester, Okla.

Hard to Prove. In an opinion recently sent a contributor in regard to title of property in Munneapolis, belonging to a client of mine, the examining attorney used the following language:

"In my opinion of the title I stated that the husband, H—— H——, must show that he is now dead or that she divorced him."

As to which our contributor comments: "As the man has been dead some 19 years, and I do not know what his life was, I am afraid I will have to rely on evidence other than his own."

Contributor: J. A. Rokes,
Seattle, Wash.

A Perfect Description. Here is a description which is contained in a deed embodying a bill of sale, which was executed on the 21st day of July, 1938, in Dade County, Florida. This particular instrument was drawn by a doctor. "Little over one acre of Land. House dwelling, Three Room and Screened Porch. Chicken House Brooder House, Cow and Horse Barn. Four Head of Stock. One Cow Milking, three Titted, Two Heifers and Bull. about 60 Chicken. Ten Ducks, Two Mated Geese. Three Grown Turkeys, three little one's."

Contributor: K. D. Harris,
Miami, Fla.

Extract from Minnesota Justice's Docket.

State of Minnesota }
County of Renville } ss

April 4, 1922. On complaint of J. B., S. N. was this day brought to court accused of being drunk and making disturbance in public. Nelson pleaded guilty and was fined $10. —as Defendant did not have the money and his presents was needed at home he was given leave to go home and attend to his work, and 10 days was set to pay the fine, he was left out on paroley and pleadged to pay his fine in time or take the concequinces.

April 12, 1922—$10.00 fine paid. As Nelsons parents are poor and very old (over 80 years) and beside have three orphan children to take care of and dont get any help from the County, the courth handed over to the old mother the $10.00 to help feed and cloth the poor children. Courth expenses = O —.

Contributor: Russell L. Frazee,
Bird Island, Minn.

Sustained. Some years ago in Clinton County, Mo. one Jones filed an affidavit in the Probate Court of that county in which he charged that his wife, Mary, was a non-compos-mentis, and asking that she be committed to the State Hospital for the insane. The hearing was before a jury, and after the complainant had rested his case, my co-counsel and I placed the accused wife on the stand as a witness in her own behalf. After our direct examination, counsel for the husband proceeded to cross-examine her as follows:

Q. Now Mary, you married your husband seven years ago, did you not?

A. Yes.

Q. You loved your husband then, did you not?

A. No.

Q. Then why did you marry him?

A. That is what I have been trying to figure out ever since.

Every one but the attorney who asked the question laughed.

The finding of the jury was that the wife was not insane.

Contributor: D. E. Adams,
Hamilton, Mo.

A Large Order. Recently in Caldwell County, a young man appeared before a Justice of the Peace with a young woman, and asked that they be married. After the usual formal proceeding the J. P. asked the young man the usual question, "Do you take this woman to be your lawful wedded wife,"to which he answered, yes. The J. P. then asked the young woman the question, "Do you take this man to be your lawful wedded husband, and promise to love, honor and obey him so long as you both live?" She hesitated and did not answer at once. The question was repeated, and she answered, "Seems that is asking a good deal." After being assured that an answer was necessary, her answer was "yes."

Contributor: D. E. Adams,
Hamilton, Mo.

A Natural Mistake. A contributor writes "A client came to see about getting a divorce for his daughter in an adjoining State, and

I questioned him with regards to the grounds that she had for bringing the action.

I asked him if his daughter could prove any act of infidelity on the part of her husband? He said: "Oh no! Her husband believes in a God and as a matter of fact, he attends his Church every Sunday."

Contributor: J. H. Bramlett,
Walhalla, S. C.

King's English.

Dear Sir;

Your letter of the 18th at hand and i note what you say inregardes To the stiney Biskeys, Mortgage against charles Rose

I was to the corthouse and asked to see the releas of the above Mortgage, and the clerks coulden find it knowwairs in the corthous thair Should be a releas on record i mean the rigenal if thair was anny and As executor i will hafto see it before i can pass on with estate

I am awair of the fact that this property was sold buy the Sheriff's sale is on record and everthing elce but the releas of the Aforesaid mortgage,

I may not be correct, but i am of the impression that if, the Facts are as i have stated them to be, I cant help but lay claim for the Amount thereof to wit; three Hundred ($300,00) Dollars, with intrest,

Hoping that i have maid my self clear to you what i am after If they can pruduce to me the reginal releas, of the aforesaid Mortigage it will be right

Thanking you in advance for your reply

Resp yours

Contributor: John Twardzik,
Shenandoah, Pa.

Cease to do Evil and Learn to do Well.

A woman had been tried in the Old Bailey for abduction of, or kidnaping, a child. Her name was A. Being convicted, his Lordship told her he would be lenient if she would disclose the whereabouts of the child. She persisted in asserting her innocence and ignorance of where the child was. She was sentenced to 6 months, but without hard labor because of her sex. Inadvertently the judge directed her to be imprisoned in a prison which by law was exclusively for men, over the gate of which was the inscription above, "Cease to do evil" etc. The following verse was composed by a budding Irish lawyer in court at the time:

In most human tribunals some harshness
prevails,
But the Court of King's Bench is both prudent and mild.
It sentenced Miss. A. to a prison for males,
As the readiest mode of producing a child.
How she'll do so surpasses conception to tell,
Should she "Cease to do Evil and Learn to
do Well,"
And if in six months, without labor, confined.
She produces a child, she'll astonish mankind.

Contributor: F. W. Thomas,
Asheville, N. C.

The Same Error. My daughter, who is just out of business school, has been working a few weeks as my stenographer. The other day I dictated to her a judgment in a divorce case. The latter part of the dictation was as follows:

"It is further adjudged that the plaintiff recover of the defendant her costs herein expended, including an attorney fee of $50.00, payable to J. C. Cannaday, her attorney herein; for all of which they may have execution."

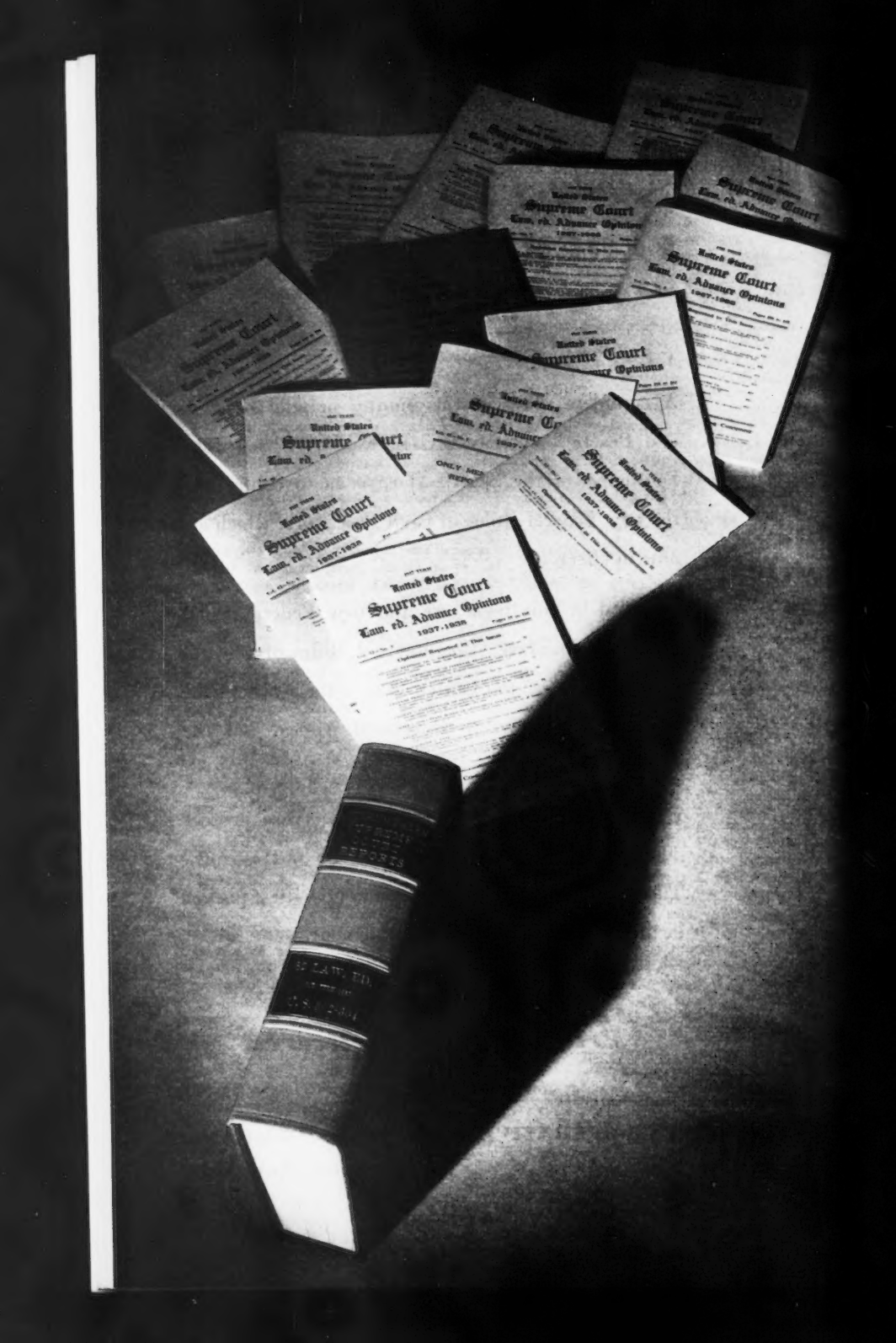
You may imagine my consternation when it came back as follows:

"It is further adjudged that the plaintiff recover of the defendant her costs herein expended, including an attorney fee of $50.00, payable to J. C. Cannaday, her attorney herein; for all of which they may be executed."

Contributor: J. Cleve Cannaday,
Providence, Ky.

An Appropriate Motion. In the mayor's court, a few months ago, a negro had sworn out a warrant against a fellow countryman charging him with certain violations of law, and the prosecuting witness went on the stand, and disregarding the necessity of at all times sticking to what the defendant regarded as the truth and nothing but the truth, was relating the affair to the mayor, when the defendant could stand it no longer, he raised up taking his chair and made a dive for the testifier, and on his first move the witness left the stand and took refuge behind the person of the mayor, and being well versed in the law, and seeing the danger that was about to come to his person, he stuck his neck from behind the mayor and said: "If your Honor pleases I move that the Defendant rests."

Contributor: E. C. Robinson,
Clinton, N. C.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